NO. 12,422

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LOMAX TRANSPORTATION COMPANY,
a corporation,
Appellant.

vs.

UNITED STATES OF AMERICA,
Appellee

Reply Brief

Upon Appeal from the District Court of the United States for the Eastern District of Washington Northern Division

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TEXT BOOKS

STATUTES

RULES AND REGULATIONS

It may be helpful to this Court for appellant to reply to the Government's brief seriatim.

I

On page 3 of its purported "Additional Statement of the Case" several points of argument are made that have no support in the record. In the first place, the statement is made, "Effort was made by the officers of the Navy to realize everything possible from the reclamation of the burned material." That is an assumption the appellant cannot concede, an assertion that is hardly consistent with the later sentence on page 5 of the Government's brief that, "The Government introduced no testimony ****," and a statement which has no evidence to support it. In the second place, by juxtaposition the rest of the paragraph on page 3 of appellee's brief would seem to infer that not only salvage "effort was made by the officers of the Navy" during the Naval Board inquiry, but that a demand was then and there made upon appellant for payment and that then there were "disputes concerning question of fact under this contract." The appellee by this use of language seems to confuse the Navy Board of Inquiry with the salvage operation later conducted by the Navy. The Naval Board of Inquiry was convened December 27, 1944, a few days after the fire and was concerned with liability or the cause of the fire, not the nature and extent of the damage. (Tr. 61).

There was absolutely nothing in its findings for the appellant to appeal from as appellee now seems to suggest on page 3 of its brief that appellent should have done. The Navy found that there was no negligence. Indeed, the findings of fact of the Naval Board of Inquiry specifically held

that recovery from the contractor under his insurance would be limited to his legal liability (which would depend upon negligence) under the existing Washington warehouse laws, and that there was no apparent negligence on the part of the defendant. Appellant has assigned as error (Assignments of Error 4 to 7 inclusive) the District Court's refusal to admit these findings as evidence on the theory they were of some probative value in showing how the Navy had interpreted its own contract and what its own conduct was with respect to it.

However, the salvage operations took place after this Naval Board of Inquiry was held and separate and apart from it. Indeed, it was not until February 2, 1945, more than two months after the fire, that any demand at all was made. (Ex. 5, Tr. 85). Until then appellant had no reason to believe that it had any practical concern with the nature and extent of damage.

Going directly to appellee's argument, on page 6 of its brief, for the first time the contract is designated by the Government to be "a contract of insurance," that is, one in which liability for performance will arise irrespective of negligence. However, this construction, ignores the fact that the printed contract itself specifically did not make the Warehouse Company an insurer. The contract itself in Article 10 thereof provided in part, as we have pointed out, that the contractor (Warehouse Company) will not be liable "for failure or delay in delivery or performance when such failure or delay is due to causes beyond the control or without the fault or negligence of contractor ****." (Art. 10,

Tr. 17, 18). Appellee has not and cannot answer this provision of its own contract.

On page 7 of its brief, the Government states that the "contract was executed according to Naval regulations" but ignores the admitted fact that one C. T. McCormack Jr., or someone else, typed in provision 4. A. which, if given the construction urged by the Government, would violate a specific provision of the Naval regulations that, "Field purchasing officers will not include *any other insurance provisions* in contracts without the approval of the Bureau of Supplies & Accounts and the Assistant Secretary of the Navy, Material Division (Procurement Branch, Insurance Section)." (Italics ours).

At the bottom of page 8 of its brief appellee complains that no cases were cited by appellant to the effect that the contract, including typewritten 4. A., should be construed mostly strongly against the Government, which drew it. It is certainly hornbook law that language will be interpreted most strongly against the party using it. 3 *Williston on Contracts* §621 (Revised Edition), which was cited by appellant), in its footnotes collates scores of cases on the point. Surely appellee does not contend that a different rule should prevail because the Government was involved. It has been aptly said:

> "The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them.****" *Carstens Packing Co. v. United States,* 62*F. Supp.* 525, quoting with approval *United States v. Bostwick,* 94 *U. S.* 53, 24 *Law Edition* 65, 66.

We are not sure that we follow appellee's argument on page 9 of its brief, but apparently it is that the Navy had only adopted a policy of self-insurance for the purpose of keeping down its contractual cost in connection with *construction* contracts and that even though a construction contract form was used here, the regulation should not apply to a contract for *storage and warehousing.*

It is true that this printed form of contract itself was usually used for the procurement of supplies and that 95% of the terms therein are not even remotely applicable to the present contract situation for storage space. Nevertheless, the Government sought to adapt it to the leasing of warehouse space, and it was a Naval scrivener apparently without any legal training who typed in the Special Provision 4. A. The quoted regulation (Vol. 1, Bureau of Supplies and Accounts Manual, Art. 1061 3 (g) outlines the general policy of the Navy to be its own insurer and there is nothing in the regulation limiting that policy to manufacturing or construction contracts as the Government would now like to limit it.

Appellant Warehouse Company had executed other Government contracts for storage and none of these had ever contained such a provision as clause 4. A. (Tr. 92, 93). Appellant was simply never informed of this construction of clause 4. A. at the time it signed the contract. The W. W. Witherspoon whose name appears on the contract merely attested as Secretary of the Company that a J. M. Lomax signed it as President. Lomax testified in substance that if the claim of an insurers liability now asserted for clause 4. A. had been called to his attention, he would never have

signed it, as he was fully aware of his warehouseman's common law liability (Tr. 93). Certainly it is plain that the Government had given him no intimation that he was expected to go into the insurance business. Certainly appellant would not have undertaken this risk at the contract rate. There is no evidence that it could have covered itself by insurance at all, and if it could, it must be assumed that it would have been at prohibitive rates which in turn it could have been expected to include in the contract rate charged the Government. Indeed, the Government recognized this and the Navy had simply adopted a policy of self-insurance for the purpose of keeping down its contractual costs. (See Naval Regulations, Volume 1, Bureau of Supplies and Accounts Manual, Article 1061 3. (g). Even if Lomax, a layman, had read provision 4. A., it would have simply corroborated his understanding that he was to be held to his usual warehouseman's liability.

The remainder of appellee's argument on pages 9 to 12, inclusive, seems to be that the Government agent could impose an insurer's liability without authority and that the Government, in contradistinction to what a private litigant could do, might take advantage of an unconscionable term in a contract which was inserted by a Government agent without authority and through the mistake or inadvertence of both parties to the contract. The fallacy of this argument is apparent. Appellant is asserting that this proviso 4. A. in the contract did not impose an insurer's liability because such was not intended by the parties. There was no evidence by the Government on the point at all, but the Warehouse Company offered such evidence. Finally, an examination

of the cases cited does not support the Government's contention that the Government could still "take advantage" of such a result beyond the authority of the Naval Contracting officer.

In support of this contention, the Government cites an 1868 case, *Gilbert & Secor v. United States,* 75 *U. S.* 358. Apparently reliance was placed upon a misleading headnote of this case which was an action by contractors to recover additional cost of copper sheathing on a drydock called for by contract. The court of claims expressly held that the Secretary of Navy had authority to make the contract and properly concluded that the plaintiff below was bound by its terms. In that case no contention was ever made by the contractor that there was any mistake in reference to their being bound by the terms of the contract to copper sheath the dock.

Again, the case of *International Contracting Company v. Lamont,* 155 *U. S.* 303, decided in 1894, is not in point. Mandamus action was brought to compel the Secretary of Navy to sign a contract based upon a first bid submitted. The second proposal for bids had been opened and plaintiff's bid accepted, his second bid being much lower than his first. It was rightfully held that mandamus would lie only to compel a ministerial act as distinguished from discretionary one; further, that the first bid was not submitted on the terms of the first offer so the Secretary of Navy was justified in refusing to act; also at the time the action was commenced the plaintiff had already signed the second contract and since mandamus lies only to compel the performance of duty existing at the time of the commencement of an action,

it would not lie because by signing the second contract the plaintiff voluntarily submitted himself to the terms of the second contract.

It must be kept in mind that here the appellant is not seeking to bind the Government by the unauthorized act of its agent, but is simply trying to relieve the Warehouse Company from an insurer's liability imposed by such an unauthorized act. Yet the Government cites *Steele v. United States,* 113 *U. S.* 128, on page 11 of its brief. This Steele case simply held that the Government was not estopped from claiming the full value of scrap delivered to a Navy contractor by the unauthorized act of a Naval officer who settled the account for much less than scrap was worth. Appellant cannot discern the applicability of this case or that of *District of Columbia v. Barnes,* 197 *U. S.* 146, also cited on page 11. This last case simply held that the court of claims had equitable jurisdiction to reform a contract upon certain facts. In short, none of the authorities cited have the remotest connection with the case at bar.

The gratuitous remarks on page 11 of the Government's brief that the appellant "may not have gotten the contract if it did not agree to the insertion of this insurance clause, *****" and that "this provision was written into the contract by both parties as the result of open bargaining ****" has no support in the record.

II

On pp. 17-28 of appellant's opening brief were discussed its assignments of error 4-7 as based upon the admission of Exhibit 3, and the Government's failure to prove damage

under the common rules of evidence, and particularly under the "shop-book" rule as embodies in 28 *U.S.C.A. Sec.* 1732, and the statutory rule admitting certain records of transactions and occurrences, contained in 28 *U.S.C.A. Sec.* 1733.

Appellee's answer to these assignments discusses said statutes (Br. pp. 16-24); and also makes a contention (Br. pp. 13-16) that appellant was bound to seek some sort of administrative relief, and that for failure to do so it cannot object to such evidence.

Appellee relies first on Article 17 of the contract as requiring that all disputes on questions of fact shall be decided by the contracting officer, subject to appeal by the contractor to the Secretary of the Navy.

We cannot see that Article 17 has any relation to the admissibility of Exhibit 3. Appellee states (p. 16) that the time for appellant to have been heard upon the dispute as to the value of the salvage and the loss caused by the fire was at the hearing before the Naval Board of Inquiry, or even after receiving the award. That Board did not pass upon the amount either of the salvage or of the loss. The investigation and finding of the Board related to the cause of the fire, and they found it was not due to appellant's negligence and that appellant was not liable for any loss other than whatever liability was imposed on it as a warehouseman under the State laws. That finding was favorable to appellant and it had no cause to appeal from it, even if any appeal were possible. But Article 17 of the contract provided no such appeal in any event. The only appeal contemplated or mentioned was *from* the contracting officer, not *to* him. Article 17 provided that questions of fact

under the contract should be decided by the contracting officer; it did not authorize appellant to appeal to such officer from a decision of the official Board set up by the Navy Department itself, regardless of whether such decision were favorable to appellant, as it was here.

Furthermore, the finding of that Board on the only question of importance to the appellant, viz., that it had no liability except such as was provided by State Law, was a question of law, not of fact; and Article 17 does not apply to questions of law nor to the construction of a contract.

Meyne v. U. S. 76 *F.S.* 814.

What was the decision of any contracting officer from which an appeal to anyone lay? The appellee is not even relying upon any of the 3 consecutive and varying estimates of amount of loss announced by the contracting officer, Captain Ball. None of them are made the basis of the Government's claim. Appellee is relying solely on an ultimatum, not of the contracting officer, or even of the Navy itself, but of the Comptroller-General of the United States asserting baldly that appellant owes the Government a specified sum. Does appellee think that either Article 17 or any law or regulation requires an appeal from the Comptroller-General to the Secretary of the Navy or to anyone else?

Next, appellee urges (Br. p. 14) that Naval Regulations cited by it, as well as 5 *U.S.C.A. Sec.* 1009c and 41 *U.S.C.A. Sec.* 113, 117, provide for seeking administrative remedies therein provided. We can see no pertinency or applicability of any of the cited regulations or statutes to the question of the admissibility or sufficiency of Exhibit 3, to which question appellee addresses these references.

Assuming arguendo that 34 *C.F.R.* 111 creates a Bureau of Supplies and Accounts, and that by virtue of the provi sions of that regulation, transcripts of records and accounts of that bureau, properly identified, and with some opportunity for appellant to inspect and satisfy itself as to their accuracy or correctness, might have been admissible to establish appellee's case prima facie, under 28 *U.S.C.A. Sec.* 1732 *or Sec.* 1733, that cannot mean that the mere conclusion of the Comptroller-General, in charge of an entirely different agency or bureau or office, would be admissible. This is the crux of appellant's of objection to Exhibit 3: it makes no prima facie case and gives no opportunity to cross examine.

A search of the provisions of 34 *C.F.R. Sec.* 31.324-.328 fails to disclose to us any disputes that may be determined by contracting officers, which by any stretch of imagination could embrace the question of the amount of loss chargeable to a contracting warehouseman in case of fire.

It is true that 34 *C.F.R. Sec.* 32.2, 32.3, provide that the Navy shall dispose of surplus property at the best price obtainable. Certainly Exhibit 3 gives the appellant no opportunity to discuss or question whether such prices were obtained; and anyone who has had occasion to observe some sales of Government surplus property may properly question whether the best prices were obtained. Even if the regulations did not have such a provision as to prices, the appellant had the legal right to such mitigation of damages as sales at the best prices reasonably obtainable would effect, and no administrative agency or regulation can take away that right under our present form of government. But to prove that appellee so acted, or to give appellant any op-

portunity either to verify or to disprove that such action was taken, by the mere introduction of Exhibit 3 alone, is obviously impossible; and any attempt to do so violates appellant's elementary and fundamental legal rights.

We do not understand that the provisions of 5 *U.S.C.A.* 1009c cited on page 15 of appellee's brief can have any reference to the question here. It relates only to "agency action." "Agency action" is defined by *Sec.* 1001 (9) as the whole or any part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act. The action here, consisting of the determination of the amount of loss, is none of those. No statute has been pointed out which gives the Comptroller-General authority by fiat alone to say, "I have settled the claim of the Government against Lomax and Lomax owes the Government so many dollars." The scope of "agency action," as contemplated in *Sec.* 1009c, is described by the Court in syllabus 4, *Snyder v. Buck,* 75 *F.S.* 902 as follows:

> "'Agency action' within provision of Administrative Procedure Act for judicial review except so far as 'agency action' is by law committed to agency discretion includes making of contracts, making of loans by lending agencies of the government, issuance of passports and visas by Department of State, issuance of visitor's permits by Immigration and Naturalization Service, and other matters in which agency is permitted by law to reach a conclusion on basis of its own discretion. Administrative Procedure Act of 1946, Sec. 10(a-c), 5 U.S.C.A. Sec. 1009 (a-c)." The list may not be exhaustive but is illustrative.

41 *U.S.C.A.*, 113, 117, likewise treat of situations entirely different from the case at bar and do not seem capable of a construction so elastic as to include it. This is not a claim

of a contractor for compensation under his contract but a claim of the Government against a citizen for the value of property lost by fire.

In conclusion of this phase of the matter, it seems clear to us that none of the citations to the regulations or statues has any pertinency to the question here; and we will proceed to examine appellee's authorities on the real question presented, viz., the effect of 28 *U.S.C.A. Sec.* 1732-1733.

We repeat the statement of our opening brief, that Exhibit 3 was not a record of account, or of a transaction, the original of an authenticated copy of which would be admissible under either section. Appellee says (p. 17) that appellant had every means of arguing to the Court the lack of personal knowledge of the entrant or maker. Appellant did so in making its objection to the introduction of the exhibit. Appellee says appellant had ample means pending the trial to take depositions to arrive at the correctness of the memo; but we had no reason to believe that appellee would not offer the best evidence or authenticated copy thereof in the usual manner of proving any account.

Appellee quotes (Br. p. 18) from *U. S. v. Gaussen*, 86 *U. S.* 198. But appellee's quotation, justifying the admission of evidence there, does not relate to "certificate of balances merely," such as Exhibit 3. The decision continues as follows:

> "Nor is the objection, that the reports charge Barrett with gross sums and with balances without giving details, sustained by the facts.
>
> "The reports are made up with much particularity, and give the items on each side of the account. It is not

> a case of a *certificate of balances* merely. We are not authorized, however, to regulate the manner in which the departments shall keep their books, or to prescribe the minuteness of the detail. The items in these reports are manifestly made up from statements and details of the daily business furnished by the collector. They are necessarily condensed when carried to a ledger account, and the results of many items or of some considerable period of time, may be stated in a briefer form than they stood upon the original entries. The means of particular information are open to either party. We see no objection on this ground to the evidence now presented, and are of the opinion that there was error in its exclusion."

Manifestly the objection there that the reports were frag mentary and incomplete was not sustained by the facts.

Likewise, in *Soule v. U. S.*, 100 *U.S.* 8 (Appellee's Br. p. 18), the Court was dealing with a *transcript* from the books of the Treasury Department and not with a mere certificate of claimed balance alone. Immediately preceding the matter quoted (Br. p. 18), the point decided is defined: "When suit is brought in any case of delinquency of a revenue officer or other person accountable for public money, *a transcript from the books* and proceedings of the Treasury Department, certified by the register, and authenticated under the Seal of the Department, shall be submitted as evidence."

In *U. S. v. Bell,* 111 *U. S.* 477 (*Br. p.* 18), a transcript from the books, not the mere certificate of the officer that he found a certain amount owing, was involved.

In *Moses v. U. S.,* 116 *U.S.* 571 (Br. p. 19), it is true that the Exhibit admitted included a certificate similar to Exhibit 3 here; but the point of that decision which approved the admission of the Exhibit was that it included also *tran-*

script from the books of the defendant containing the account involved, items both debit and credit. In Exhibit 3 here, there is a statement of purported gross items lost and salvaged and of purported values; but that statement does not purport to be a transcript from any books of account, or based on any entries made under the shop book rule, or to be a copy or transcript of any actual record of any transaction or occurrence.

U. S. v. Pierson, 145 *F* 814 (Br. p. 19, 20), likewise requires a *transcript of books* showing prima facie the account sued on; the Court saying, "To be admissible the transcript should not be a mere statement of resultant balances."

And *U. S. v. Du Perow,* 208 F 895 (Br. p. 20), is appellee says, of like effect.

We pass without discussion appellee's comment (Br. pp. 20-21) on the cases cited in appellant's opening brief, and merely reaffirm our views presented in that brief that they strongly support appellant's contention for the reasons there stated; except that, with reference to appellee's statement (p. 21) that in the Rugo and Mohawk cases the appraiser could have been called as a witness for cross examination which could not have been done with the Naval Board of Inquiry, we merely observe that we are dealing in this law suit with nothing the Board had anything to do with as to the amount of fire loss, and that as to the certificate Exhibit 3, made by the Comptroller-General, had he been called as a witness, he would have had no knowledge of the facts upon which his conclusion is based, and could not have testified with regard to such facts, nor could he, without some foundation, have qualified to express his conclusion stated in Exhibit 3.

On p. 22 of its brief appellee again misconceives the action of the Naval Board of Inquiry. It did not find the amount of loss. Between its investigation and the issuance by the Comptroller-General of Exhibit 3, a matter of 23 months, the contracting officer had made three different estimates of such loss and no final estimate or purported determination thereof was made by anyone until Exhibit 3 was prepared. The loss now claimed by the Government consists of no estimate or computation made by that Board nor even by the contracting officer in his three attempts so far as the records show. None of them are of any concern here. There never was any dispute or opportunity for one regarding the amount claimed in Exhibit 3. The Comptroller-General merely announced that a certain amount, not theretofore named or suggested, was owed by the defendant. The appellant does not claim, as suggested in the closing paragraph on page 22 of appellee's brief, that the Government necessarily had to produce witnesses to testify as to their personal recollection of items lost, salvaged or damaged, and their value. Of course, if they had been produced, they could have been cross examined. But such persons, even if not produced, must have made regular entries or records. *Title* 28 *U.S.C.A. Sec.* 1732 and 1733 would require a transcript of such entries or records and that was what the appellant was entitled to expect and what the Government did not produce at the trial.

Respectfully submitted,

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